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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 690

IN THE MATTER OF

PORTAGE WHOLESALE COMPANY,

DEBTOR.

JACOB H. MARACHOWSKY,

Petitioner,

vs.

GEORGE L. DEVINE, TRUSTEE OF THE PORTAGE WHOLESALE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	PAGE
Petition for Writ of Certiorari	1
Summary and Statement of Matters Involved	2
Statement as to Jurisdiction of This Court to Grant Certiorari	5
The Statute Involved	6
Date of Judgment Sought to Be Reviewed and Reference to the Decision of the Court of Appeals and the District Court	6
The Questions Presented	7
Reasons Relied On for the Allowance of the Writ	8
The Questions Involved	11
I. Does Section 367 (Title XI U. S. C. A. Section 767) Give Title to a Trustee in Bankruptcy of Assets or Moneys Borrowed to Effect a Plan of Arrangement Subsequent to the Date of the Filing of the Petition for Arrangement Where the Arrangement Fails After Confirmation and Before the Entire Amount Required to Effectuate the Plan is Deposited With the Court?	11
II. Does Moneys and Properties Acquired From Other Sources Deposited With the Referee in Bankruptcy Pursuant to Section 337 of the Chandler Act (Title XI U. S. C. A. Section 737) Become Part of the Assets of the Bankrupt Estate Where the Plan of Arrangement Fails After Confirmation and the Debtor is Adjudicated a Bankrupt, or Should Said Funds Be Returned to the Sources From Which They Came?	12
III. Does an Order Entered by a District Court in Bankruptcy Become Final Within 10 Days or is the Order Interlocutory and the Court Has Jurisdiction Over a Petition to Vacate the Same Within 22 Days After Its Entry Where Evidence is Heard in Support of the Petition and Against the Said Petition?	15
Conclusion	16
Cases, Statutes and Other Citations	ii
Appendix	17

Cases Cited.

Albertson v. Federal Communications Commission (Dunkirk Broadcasting Corporation Intervenor), 182 F. 2nd 397 ..... 10, 15

Bowman v. Loperena, et al., 311 U. S. 262, 61 Sup. Ct. 201, 85 L. Ed. 177 ..... 10, 15

In re Famous Furniture Co., Inc., 43 Fed. Supp. 946 ..... 3, 10, 14

In re Gitnig, et al.—Chalmers v. Swartz, 57 F. 2nd 43 ..... 10, 14

Gypsy Oil Co. v. Escoe, 275 U. S. 498 ..... 10, 15

Indemnity Ins. Co. of North America v. Reisley, 153 F. 2nd 296 ..... 10, 15

In re Koegel, et al., ex parte Buss, 56 F. 2nd 827 ..... 10, 14

Safeway Stores, Inc. v. Coe, 1943, 78 U. S. App. D. C. 19, 136 Fed. 2nd 771, 774, 148 A. L. R. 782 ..... 10, 15

Voorhees v. John T. Noye Mfg. Co., 151 U. S. 135. .. 10, 15

Wayne United Life Ins. Co. v. Haines City, Florida, 117 F. 2nd 574 ..... 10, 15

Statute and Other Citations.

Secs. 325, 326 Chandler Act 10

Sec. 337 Chandler Act (Title XI U. S. C. A. Sec 737) 1, 5, 6, 7, 8, 12, 17

Sec. 367 Chandler Act (Title XI U. S. C. A. 767) 1, 5, 6, 7, 8, 9, 11, 17

Collier on Bankruptcy, 14th Edition, Volume 8, pp. 567-8-9 and p. 1416 ..... 10, 12, 13

11 U. S. C. A. Sec. 737 ..... 1, 4, 5, 6, 7, 12, 17

11 U. S. C. A. Sec. 767 ..... 1, 4, 5, 6, 7, 9, 11, 17

Title 28, U. S. C. Sec. 1254 (Judicial Code Sec. 1254) .. 5

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Your Petitioner, Jacob H. Marachowsky, respectfully prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit entered on March 2, 1951, which determined that the Petitioner had no right to recover back a deposit of $25,000.00 with the Referee in Bankruptcy which sum was part of the required $175,000.00 to effect a plan of arrangement under Section 337 of the Chandler Act (Title XI of the U. S. C. A. Sec. 737) and Section 367 of the Chandler Act (Title XI U. S. C. A. Sec. 767).

SUMMARY AND STATEMENT OF MATTERS INVOLVED.

The Petitioner, Jacob H. Marachowsky, was the principal officer, stockholder and managing agent of the Portage Wholesale Company, Debtor. On January 21, 1947, a petition for arrangement under Chapter XI of the Chandler Act (Title XI U. S. C. A. Section 706, *et seq.*) (Rec. 1 to 3) was filed.

On July 25, 1947, a second plan was filed pursuant to which there was deposited with the Referee in Bankruptcy the sum of $25,000.00 with a stipulation that an additional $125,000.00 would be deposited to pay creditors in accordance with the second plan of arrangement, upon acceptance and confirmation thereof.

On August 18, 1948, a second amended plan was proposed and the total amount to pay creditors was increased to $175,000.00. This plan was accepted by the creditors and confirmed by the Court on October 15, 1948.

On December 16, 1948, the additional $150,000.00 was in Court but counsel for the debtor was not present because of an engagement in another Court and the Court refused to hold the matter over until the following day and adjudicated the debtor a bankrupt and ordered the $25,000.00 deposited with the Referee forfeited (Rec. 86).

There is no question but what the $25,000.00 was moneys borrowed by the Petitioner from friends and relatives to attempt to effect the plan of arrangement (Rec. 49, Rec. 51, Rec. 52-53, Rec. 56-57).

Jacob H. Marachowsky filed a petition on January 6, 1949, to vacate the order entered by the Court on December 16, 1948, forfeiting the $25,000.00 deposited with the Referee in Bankruptcy and the finding that said deposit

was an asset of the bankrupt estate, and that title to which was in the trustee.

On November 23, 1949, a hearing was had on the said petition of Jacob H. Marachowsky to vacate the order of December 16, 1948, and evidence was taken by the Court.

Thereafter on February 2, 1950, an order was entered denying the relief sought by the petition on the following grounds set forth in said order (Rec. 123-127):

1. "* * * Under the provisions of Chapter XI of the Chandler Act above cited, the creditors are not concerned with any agreement debtor may have had with a third person in procuring funds for the deposit. The Statute does not permit anyone other than the debtor to make the arrangement proposal or the deposit thereunder.

2. *The deposit was made by the debtor and when the debtor defaulted and was adjudicated a bankrupt the deposit automatically became an asset of the bankrupt estate to be used as provided by Statute for the payment of priority debts and the costs and expenses of administration.* (Italics ours.)

3. In this instance the Trustee has applied the deposit toward the payment of unpaid taxes in the sum of $11,533.87, and the balance on the costs and expenses of administration.

4. All of the cases cited by counsel for petitioner except the *Famous Furniture* case, 43 F. Supp. 946, arose under the old Bankruptcy Act and have no bearing upon the issues presented by this motion. * * *

5. On the motion before this court it is undisputed that after the deposit was made the plan was accepted and was confirmed by the court, and thereafter debtor defaulted in the performance of its obligations under the plan and was adjudicated a bankrupt.

6. The petition to vacate the order dated December 16, 1948, was not filed until January 6, 1949. The order to show cause based on said petition was dated January 11, 1949, more than a year after the entry of the order sought to be vacated. (Court was in error. Pe-

tition to vacate actually was filed 22 days after order of December 16, 1948.)

7. Rule 54 of the Federal Rules of Civil Procedure defines a judgment as follows: ' "Judgment" as used in these rules includes a decree and any order from which an appeal lies.'

8. Rule 59 (e) of said Rules provides that 'A motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment.' Petitioner has failed to comply with this Statute.

9. No claim was or could be made that the order was entered by mistake, inadvertence or excusable neglect. The attorneys now representing petitioner represented him and the debtor before and at the time the order was entered and subsequent thereto.

10. *The Petitioner is not entitled to a return of the deposit for the reason that on debtor's default the deposit became an asset of the bankrupt estate to be applied by the Trustee toward the payment of priority debts and the costs and expenses of administration, and for the further reason that the motion was not filed within the time fixed by Statute.* (Italics ours.)

The most that can be said for petitioner's claim is that he may possibly stand in a position similar to other unsecured creditors and entitled to share in the distribution of the assets of the bankrupt's estate."

The fundamental issue involved is whether or not under Sections 337 and 367 of the Chandler Act there is an automatic shift of the title of moneys borrowed to effect a plan of arrangement to the Trustee, because the plan failed to materialize subsequent to the time of acceptance thereof and confirmation by the Court and prior to the time when the plan actually is put into operation, or whether the Trustee secures title to assets owned by the debtor on the date of the filing of his original petition under Chapter XI.

The petitioner, Jacob H. Marachowsky, filed an appeal from the order of the District Court denying the relief sought by his petition and an appeal was taken to the

United States Court of Appeals for the Seventh Circuit, which affirmed the order of the District Court 187 Fed. 2nd 387 (Rec. 148).

The United States Court of Appeals for the Seventh Circuit which affirmed the order of the District Court stated in its opinion on page 389 as follows:

> "As already noted, the arrangement proposal was agreed to by the creditors and confirmed by the court. *While we have been unable to find any case construing this particular statute,* it would seem that under the plain language the deposit, upon confirmation of the arrangement, at once became available for the payment of priority debts and for the cost and expenses of the proceeding, and that it could and perhaps should have been at that time so expended. The language of the statute indicates that such was the precise purpose for which the deposit was required and made, and this irrespective of whether the debtor defaulted in the payment of the balance of the money which it had agreed to pay." (Italics ours.)

STATEMENT AS TO JURISDICTION OF THIS COURT TO GRANT CERTIORARI.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254 (Judicial Code Section 1254).

The subject matter involves the interpretation of a federal statute—Sections 337 of the Chandler Act (Title XI U. S. C. A. Section 737) and Section 367 (Title XI U. S. C. A. Section 767).

STATUTE INVOLVED.

The Statute involved is Sections 337 of the Chandler Act (Title XI U. S. C. A. Section 737) and Sections 367 (Title XI U. S. C. A. Section 767). The said sections of the Statute is set forth in full in the Appendix.

DATE OF JUDGMENT SOUGHT TO BE REVIEWED AND REFERENCE TO THE DECISION OF THE COURT OF APPEALS AND THE DISTRICT COURT.

The decision sought to be reviewed is that of the United States Court of Appeals entered on March 2, 1951, and reported in 187 Fed. 2nd 387 (Rec. 143).

The decision of the Court of Appeals sustains the order of the District Court for the Western District of Wisconsin, entered on February 2, 1950 (Rec. 123). 88 Fed. Supp. 3.

A petition for rehearing was denied by the United States Court of Appeals for the Seventh Circuit on March 24, 1951.

THE QUESTIONS PRESENTED.

1. Does Section 367 (Title XI U. S. C. A. Section 767) give title to a trustee in bankruptcy of assets or moneys borrowed to effect a plan of arrangement subsequent to the date of the filing of the petition for arrangement where the arrangement fails after confirmation and before the entire amount required to effectuate the plan is deposited with the Court?

2. Does moneys and properties acquired from other sources deposited with the Referee in Bankruptcy pursuant to Section 337 of the Chandler Act (Title XI U. S. C. A. Section 737) become part of the assets of the bankrupt estate where the plan of arrangement fails after confirmation and the debtor is adjudicated a bankrupt, or should said funds be returned to the sources from which they came?

3. Does an order entered by a District Court in bankruptcy become final within 10 days or is the order interlocutory and the Court have jurisdiction over a petition to vacate the same within 22 days after its entry where evidence is heard in support of the petition and against the said petition?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Court of Appeals has decided important questions of federal law in connection with Sections 337 and 367 of the Chandler Act. The Court frankly states in its opinion that they have found no decisions in support for or against the petitioner, construing the said Sections of the Chandler Act. Therefore the effect of said sections should be interpreted and settled by the Supreme Court.

The issues involved in these proceedings is whether or not a deposit made of $25,000.00 with the Referee in Bankruptcy subsequent to the filing of an original petition for arrangement under Chapter XI of the Chandler Act with an agreement that if the arrangement is confirmed an additional $125,000.00 would be deposited; that thereafter the creditors accepted the plan of arrangement after the amount had been raised from $150,000.00 to $175,000.00 and the Court confirmed the arrangement on October 15, 1948.

On December 16, 1948, the additional $150,000.00 was in Court but the attorney representing the debtor was trying a case in another court. A request was made to hold the matter over until the following day to permit the attorney for the debtor to be present, but the Court refused to do this and entered an order forfeiting the $25,000.00 deposited and holding that title thereto under the Chandler Act, shifted to the trustee and was an asset of the bankrupt estate.

There was no question that the $25,000.00 did not belong to the debtor nor did it have it in its possession or control nor was it part of its assets on the date it filed its petition for reorganization on January 21, 1947.

The deposit of the $25,000.00 in connection with its plan of arrangement was made on July 25, 1947, the result of moneys borrowed by Jacob H. Marachowsky, the petitioner from relatives and friends to carry out the plan of reorganization.

Upon the order of forfeiture and adjudicating the debtor a bankrupt, the Court stated that the title to the $25,000.00 automatically shifted to the bankrupt estate and that the title thereto was vested in the trustee.

It is contended by Petitioner that under Section 367 (Title XI, U. S. C. A. Section 767) title to the $25,000.00 or title to any additional moneys deposited to carry out the plan of arrangement was not vested in the trustee of the debtor, or in the debtor corporation, but that if all of the moneys required under the plan of arrangement had been deposited it would have had to be delivered to someone designated by the Court to distribute the same to those persons entitled thereto under the plan of arrangement and at that point, title to the debtor's property would have been revested in the debtor.

In this case, after the plan of arrangement had been confirmed and the additional moneys were in Court, the Court adjudicated the debtor a bankrupt and forfeited the $25,000.00 and directed that the same be used in payment of taxes, costs of administration and the balance to be distributed among general creditors by the trustee.

The language of the statute is plain and simple. It provides that when all the moneys are deposited then they are to be distributed in accordance with the plan. If for any reason the plan fails after confirmation and the debtor is adjudicated a bankrupt, the assets owned by the debtor corporation on the date of the filing of the original petition, namely, in this case, January 21, 1947, would be vested in the trustee.

The moneys secured after the filing of the petition from outside sources by the debtor, or someone representing the debtor would have to be returned to those sources. If the Court desired to have a deposit as a guarantee against losses, such protection could have been provided by order of Court under Sections 325 and 326 of the Chandler Act (Title XI, U. S. C. A. Section 726 and 727). In this case no such indemnity was exacted.

As far as we have been able to ascertain the authorities which sustain the petitioner's petition are as follows:

Collier on Bankruptcy, 14th Edition, Vol. 8, pp. 567-8-9 and p. 1416.

In Re A. Roth Co., Inc.—Roth v. *Chatz,* 118 Fed. 2nd 156.

In re Koegel, et al., ex parte Buss, 56 F. 2nd 827.

In re Gitnig et al.—Chalmers v. *Swartz,* 57 F. 2nd 43.

In re Famous Furniture Co., Inc., 43 Fed. Supp. 946.

Bowman v. *Loperena, et al.,* 311 U. S. 262, 61 Sup. Ct. 201, 85 L. Ed. 177.

Voorhees v. *John T. Noye Mfg. Co.,* 151 U. S. 135.

Gypsy Oil Co. v. *Escoe,* 275 U. S. 498.

Wayne United Life Ins. Co. v. *Haines City, Florida,* 117 F. 2nd 574.

Albertson v. *Federal Communications Commission (Dunkirk Broadcasting Corporation Intervenor),* 182 F. 2d 397.

Indemnity Ins. Co. of North America v. *Reisley,* 153 F. 2nd 296.

Safeway Stores, Inc. v. *Coe,* 78 U. S. App. D. C. 19, 136 Fed. 2nd 771.

THE QUESTIONS INVOLVED.

The questions involved are:

I.

Does Section 367 (Title XI U. S. C. A. Section 767) Give Title to a Trustee in Bankruptcy of Assets or Moneys Borrowed to Effect a Plan of Arrangement Subsequent to the Date of the Filing of the Petition for Arrangement Where the Arrangement Fails After Confirmation and Before the Entire Amount Required to Effectuate the Plan is Deposited With the Court?

The Section of the Statute under consideration applies to a situation under the Chandler Act where a plan of arrangement has been proposed and confirmed by the Court. It contemplates that all of the moneys, securities or other properties necessary to effectuate the plan as confirmed has been deposited and that nothing remains to be done but the distribution of the entire moneys deposited, and upon payment to the creditors all claims against the property of the debtor are barred. It contemplates the revesting of the title to the properties of the debtor in the debtor or in a new corporation organized by it, free and clear of all of the debts, obligations and liabilities existing prior to the filing of the petition for arrangement under Chapter XI of the Chandler Act. In the case at bar the proposed plan of arrangement failed after confirmation and prior to the time when the moneys and properties necessary to effectuate the plan had been deposited in accordance therewith.

The $25,000.00 deposited with the Referee was moneys borrowed as was the additional $150,000.00. The additional

moneys was in Court on December 16, 1948 but the attorney for the debtor corporation was not present and the Court refused to hold the matter over until the following day, and instead ordered the $25,000.00 in the hands of the Referee forfeited and title thereto to be automatically vested in the trustee. This in our opinion, is contrary to the Statute and all its intents and purposes.

The plan failed after confirmation and before it became operative. There never was any order requiring any indemnification to guarantee the carrying out of the plan. This could have been required as a condition to confirmation under the Chandler Act.

Question arises for determination by this Court under this Section of the Chandler Act is:

Where part of the money is put up to carry out the plan of arrangement but the plan is never made operative are the moneys deposited forfeited under the Act?

We say no.

II.

Does Moneys and Properties Acquired From Other Sources Deposited With the Referee in Bankruptcy Pursuant to Section 337 of the Chandler Act (Title XI U. S. C. A. Section 737) Become Part of the Assets of the Bankrupt Estate Where the Plan of Arrangement Fails After Confirmation and the Debtor is Adjudicated a Bankrupt, or Should Said Funds Be Returned to the Sources From Which They Came?

Collier on Bankruptcy, 14th Edition, Volume 8, pages 567-8-9, reads as follows:

> "Under Sec. 337 (2) * * * the debtor may acquire the money and other property required for the deposit by the use of his credit, or on the security of the estate effective before or after title thereto has

revested upon confirmation of the arrangement, or otherwise. Money or other property of the estate may be used as part of the deposit if so authorized by the court, as was not infrequently done under former Sec. 12. If the money or other property required for the deposit is to be obtained on the security of the estate, effective before title thereto has revested, authorization therefor must be obtained from the court, and provision should be made for a return of the security contemporaneous with a return of the money or other property acquired thereon in the event the arrangement fails of confirmation. The principle in authorizing the delivery of security to obtain money or other property required for the deposit is the same as in authorizing the use of money or other property of the estate for the purpose of the deposit. The deposit is 'subject to the control of the court,' and where an arrangement fails of confirmation should be disposed of as the court may direct. If any money or other property included in the deposit came from the debtor's estate, it should be returned to the estate. If any such money or other property came from sources outside the estate, it should be returned to those sources, and does not become a part of the estate; losses during the pendency of the arrangement proposal cannot be charged against that money or other property, but protection against such losses should be obtained under Sec. 325 or Sec. 326." (Citing cases.)

Page 1416 reads as follows:

"Where the court has retained jurisdiction after the confirmation of an arrangement, and the debtor defaults in any of the terms thereof or the arrangement terminates by reason of the happening of a condition specified therein, an order directing bankruptcy may be entered under Sec. 377. The title situation there is a troublesome one akin to the problem of the status of debts contracted after confirmation where bankruptcy is directed under sec. 377. Confirmation of the arrangement is not set aside under sec. 377, and there-

fore sec. 70 h does not apply. As a result, sec. 70a applies in its entirety, and a trustee in a sec. 321 case is vested with the title of the debtor as of the date of the filing of the bankruptcy petition, while in a sec. 322 case he is vested with the title of the debtor *as of the date of the filing of the Chapter XI petition.* In both cases that includes, of course, accretions to the property up to the date of confirmation. *The trustee is not vested with the title of the debtor as of the date of the order under sec. 377,* thus presenting the difficult practical problem of distinguishing between the property at the date of confirmation and its proceeds, which constitute the property of the estate, and the newly acquired property. It would be a more satisfactory and more equitable solution if the trustee were vested with the title of the debtor as of the date of the order under sec. 377, similar to the sec. 386 (1) situation, *but there is no statutory warrant for that result.* * * *" (Italics ours.)

In re A. Roth Co., Inc.—Roth v. *Chatz,* 118 Fed. 2nd 156, the Court held that where a petition for reorganization under Chapter XI is filed, approved and thereafter there is a default and the debtor corporation is adjudicated a bankrupt the trustee is vested with title to bankrupt's assets as of the date of the filing of the original petition under Chapter XI proposing an arrangement or plan and that he does not automatically or otherwise have title to money or property deposited by the principal shareholder, his own funds, as a deposit or security as a guarantee for the carrying out of the plan of arrangement.

In re Koegel, et al., ex parte Buss, 56 F. 2nd 827; *In re Gitnig, et al.—Chalmers* v. *Swartz,* 57 F. 2nd 43; *In re Famous Furniture Co., Inc.,* 43 Fed. Supp. 946, the Courts uniformly held in said cases, that moneys or property deposited by others to effect a plan of arrangement and where the plan fails after confirmation, the said deposits are not assets of the bankrupt estate and does not pass

to the trustee in bankruptcy, but should be returned to the sources from which they came.

III.

Does an Order Entered by a District Court in Bankruptcy Become Final Within 10 Days or is the Order Interlocutory and the Court Has Jurisdiction Over a Petition to Vacate the Same Within 22 Days After Its Entry Where Evidence is Heard In Support of the Petition and Against the Said Petition?

In *Bowman* v. *Loperena, et al.*, 311 U. S. 262, 61 Sup. Ct. 201, 85 L. Ed. 177, *Voorhees* v. *John T. Noye Mfg. Co.*, 151 U. S. 135, *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, *Wayne United Life Ins. Co.* v. *Haines City, Florida*, 117 F. 2nd 574, *Albertson* v. *Federal Communications Commission* (*Dunkirk Broadcasting Corporation Intervenor*), 182 F. 2nd 397, *Indemnity Ins. Co. of North America* v. *Reisley*, 153 F. 2nd 296, *Safeway Stores, Inc.* v. *Coe*, 78 U. S. App. D. C. 19, 136 Fed. 2nd 771, the Courts uniformly held that where a full hearing is had on a petition and the same is considered on its merits, and subsequently the petition is denied, the judgment of the Court as originally entered does not become final until such denial and the time for appeal runs from the date of the denial of the petition.

They also uniformly hold that orders in a Court of Bankruptcy are interlocutory are not final and the Court may vacate, alter or amend the orders at any time up to the date of the final decree. The Court, therefore, had jurisdiction of the petition of Jacob H. Marachowsky, Petitioner.

Conclusion.

In setting forth Petitioner's reasons for the granting of a Writ of Certiorari, we have attempted to limit the discussion to indicate the fact that there are important questions of federal law concerning the sections of the Chandler Act hereinbefore set forth, which have not been and should be settled by the Supreme Court. The petitioner is not appending a supporting brief or argument on any of the other propositions of law or fact involved in the interest of brevity and for the reason that such a brief may deal with the merits which is a discussion not contemplated by the Rules of this Court in a Petition for a Writ of Certiorari.

The Petitioner believes that this Petition sets forth important questions of federal law which, in the public interest, requires the granting of a Writ of Certiorari as herein prayed.

In the event this prayer is granted, the Petitioner desires to submit a brief fully discussing the issues raised in this Petition.

Respectfully submitted,

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Petitioner,

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APPENDIX.

Title XI Bankruptcy U. S. Code Annotated Section 767:

"Sec. 767. Effect of confirmation.

Upon confirmation of an arrangement—

1. the arrangement and its provisions shall be binding upon the debtor, upon any person issuing securities or acquiring property under the arrangement and upon all creditors of the debtor, whether or not they are affected by the arrangement or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable;

2. the money deposited for priority debts and for the costs and expenses shall be disbursed to the persons entitled thereto;

3. the consideration deposited, if any, shall be distributed and the rights provided by the arrangement shall inure to the creditors affected by the arrangement whose claims are not barred by the provisions of section 754 of this title, and (a) have been proved prior to the date of confirmation and are allowed, or (b) whether or not proved, have been scheduled by the debtor as fixed liabilities, liquidated in amount, and are not disputed; and

4. except as otherwise provided in sections 769 and 770 of this title, the case shall be dismissed. (July 1, 1898, ch. 541, sec. 367, as added June 22, 1938, ch. 575, sec. 1, 52 Stat. 912.)"

Title XI Bankruptcy U. S. Code Annotated Section 737:

"Sec. 737. Same; conduct and business after acceptance of arrangement.

At such meeting, or at any adjournment thereof, the judge or referee shall, after the acceptance of the arrangement—

1. appoint the receiver or trustee, if any, or otherwise appoint some other person, to receive and distribute, subject to the control of the court, the moneys

and consideration, if any, to be deposited by the debtor; require such person to give bond with surety to be approved by the court in such amount as the court shall fix; and fix the amount or rate of such person's compensation, not in excess of the compensation allowable to a receiver under this title;

2. fix a time within which the debtor shall deposit, in such place as shall be designated by and subject to the order of the court, the consideration, if any, to be distributed to the creditors, the money necessary to pay all debts which have priority, unless such priority creditors shall have waived their claims or such deposit, or consented in writing to any provision of the arrangement for otherwise dealing with such claims and the money necessary to pay the costs and expenses of the proceedings and the actual and necessary expenses incurred in connection with the proceedings and the arrangement by the committee of creditors and the attorneys or agents of such committee, in such amount as the court may allow; and

3. fix a time for the filing of the application to confirm the arrangement and for a hearing on the confirmation thereof or any objections to the confirmation, unless such times have already been named in the notice of the meeting or unless all creditors affected by the arrangement have accepted it. (July 1, 1898, ch. 541, sec. 337, dated June 22, 1938, ch. 575, sec. 1, 52 Stat. 908.)''

Office Supreme Court, U.S.
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CHARLES ELMORE CROPLEY
CLERK

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GEORGE L. DEVINE, TRUSTEE OF THE PORTAGE WHOLESALE COMPANY,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

PAGE

Additional Statement of Matters Involved..... 2

Argument 5

I. Under Supreme Court Rule 38, a writ of certiorari will not be issued to review disputed issues of fact. The decision of the Circuit Court of Appeals of the Seventh Circuit in this case is one of fact. The District Court and the Circuit Court of Appeals found as a fact that Jacob H. Marachowsky, the petitioner and appellant herein, had no interest in the subject matter 5

II. Sections 337 and 367 of the Chandler Act directs the court, upon confirmation to use the deposit for the payment of priority debts and costs and expenses of administration. This statute follows a principle of law established prior to its enactment. Clarification is not required under Supreme Court Rule 38 of the Federal Statutes 8

III. Title to the money deposited was in the Portage Wholesale Company. Source of the money is immaterial. The fund deposited by the Portage Wholesale Company should be charged with the expenses and costs arising out of the failure of the Portage Wholesale Company to fulfill the arrangement. This rule of law applied in this case does not require clarification and is not in conflict with the decisions..... 10

IV. The proceedings by the Portage Wholesale Company under Chapter XI, were for the benefit of the debtor. The proceedings were continued to allow the debtor to perfect its arrangement. The creditors are entitled to the property of the debtor without paying the expenses of receivership. There should be no diminution of assets to pay expenses created by the debtor. This rule of law applied in this case is not in conflict with the decisions. Sections 337 and 367 involve administrative directives and do not involve important questions of Federal law.... 12

V. The application in the District Court to modify or vacate the Court's order was not timely made under Federal Rules of Civil Procedure, 59(e) 13

Conclusions 14

Cases, Statutes, and other Citations..... ii

CASES CITED.

In re Portage Wholesale Company, 187 Fed. (2d) 387.. .....4, 10, 14

In re Wiener, 215 Fed. 278.....9, 12

In re Balco Builders, 22 F. (2d) 846.....9, 12

In re Moyer's Home Store, 26 F. (2d) 146.....9, 12

In re Wiener, 217 Fed. 173.....9, 11, 12

In re Miller, 243 Fed. 242 (N. Y. D. C.).....9, 12

Famous Furniture Co., 43 Fed. Sup. 946..... 10

STATUTES CITED.

Title XI, U. S. C. A. Sec. 706..... 2

Federal Rules of Civil Procedure, No. 17 (a)..... 8

Federal Rules of Civil Procedure, No. 59 (e)..... 13

Title XI, U. S. C. A. Sec. 767 (367 Chandler Act)..8, 12, 13

Title XI, U. S. C. A. Sec. 737 (337 Chandler Act)..8, 12, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 690

IN THE MATTER OF
PORTAGE WHOLESALE COMPANY,
DEBTOR.

JACOB H. MARACHOWSKY,
Petitioner,

vs.

GEORGE L. DEVINE, TRUSTEE OF THE PORTAGE WHOLESALE COMPANY,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

George L. Devine, Trustee of the Portage Wholesale Company, Respondent, in the above entitled action does herewith file his brief and argument in answer to the request of Jacob H. Marachowsky, petitioner, for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit, entered on March 31, 1951, and reported in 187 Fed. (2d) 387.

ADDITIONAL STATEMENT OF MATTERS INVOLVED.

The Portage Wholesale Company was a Wisconsin Corporation, organized and existing under and by virtue of the laws of the State of Wisconsin. The Portage Wholesale Company, as a corporation, petitioned for an arrangement under Chapter XI of the Chandler Act (Title XI, U. S. C. A., Section 706, *et seq.*)

Jacob H. Marachowsky was a stockholder in said corporation and its Vice-President.

All proposed plans of arrangement were filed by the Portage Wholesale Company, being the debtor corporation. On July 25, 1947, the Portage Wholesale Company, as part of a second proposed plan of arrangement, deposited $25,000.00 with the Referee in bankruptcy. The Portage Wholesale Company also proposed to pay an additional $125,000.00 which was later increased to $150,000.00 said payment to be made by the Portage Wholesale Company upon acceptance and confirmation of the plan of arrangement.

This plan of arrangement proposed that the money so deposited be used to pay actual and necessary costs and expenses of administration, all taxes, priority debts, etc. (R. 49-52.)

The $25,000.00 deposited by the Portage Wholesale Company, the debtor corporation, was borrowed by the Portage Wholesale Company from Philip Wain Co. and others. After it was borrowed it was deposited by the Portage Wholesale Company. The $25,000.00 was not loaned to the corporation by Jacob H. Marachowsky. The

$25,000.00 was not deposited by Jacob H. Marachowsky. (R. 55-56, 64-65, 101-104.)

The plan of the Portage Wholesale Company was accepted by the creditors and was confirmed by the Referee on September 21, 1948. The order of confirmation ordered that the balance of the money, to-wit, $150,000.00, be paid into court by the Portage Wholesale Company not later than October 20, 1948. (R. 74.)

An appeal was taken to the District Court, and the District Court confirmed the order of the Referee on October 15, 1948. (R. 78.)

The Portage Wholesale Company did not make payment of the balance of the money in to court as provided in the order of September 21, 1948.

Because of the default, on December 7, 1948, a petition was filed with the District Court to declare the Portage Wholesale Company a bankrupt and to secure an order charging the $25,000.00 deposit with the costs and expenses of administration, taxes, etc. On December 16, 1948, the Portage Wholesale Company was adjudicated a bankrupt and the $25,000.00 was ordered remitted to the Trustee in Bankruptcy, to pay the costs of administration and expenses, and taxes. (R. 90-91.)

On December 16, 1948, the Portage Wholesale Company did not have the balance of the funds in court. The $150,000.00 referred to by the petitioner was in the hands of third parties who refused to deposit it in court or to advance it to the debtor corporation. (R. 85-87.)

On January 6, 1949, Jacob H. Marachowsky, as an individual, filed a petition to vacate the order of December 16, 1948. An order to show cause was issued by the District Court on January 11, 1949, and served in January 13, 1949. Hearing was had thereon on November 23, 1949, and an order denying the motion and petition of Jacob H. Mara-

chowsky was entered by the District Court on February 3, 1950. (Tr. 123-127.)

Jacob H. Marachowsky as an individual appealed from this order to the Circuit Court of Appeals of the Seventh Circuit. George L. Devine, Trustee in Bankruptcy, the appellee, among other defenses, set forth the defense that the motion in District Court and the appeal to the District Court of Appeals for the Seventh Circuit was not brought by the real party in interest and that Jacob H. Marachowsky, as an individual, had no interest in the subject matter.

The Circuit Court of Appeals decided this case upon this issue, saying:

> "The contention of Jacob H. Marachowsky (hereinafter referred to as appellant) in this court, both in his brief and oral argument, rests upon the assertion that the $25,000.00 deposited with the referee in bankruptcy was not the money and property of the debtor but that of appellant. He further contends that for this reason he was entitled to a return of the deposit upon the failure of the debtor to perform under the arrangement which it had proposed. It is evident that the appellant's contention can be sustained only if the premise upon which it rests is acceptable and that the issue, as thus narrowly presented makes it unnecessary to consider a multitude of questions which lurk in the record." (R. 144.)

Thus it would seem that the decision of the Circuit Court of Appeals, 187 Fed. (2d) 387, is based upon findings of fact and not upon the interpretation of a Federal Statute.

ARGUMENT.

I.

Under the Supreme Court Rule 38, a Writ of Certiorari Will Not Be Issued to Review Disputed Issues of Fact. The Decision of the Circuit Court of Appeals of the Seventh Circuit in This Case Is One of Fact. The District Court and the Circuit Court of Appeals Found as a Fact That Jacob H. Marachowsky, the Petitioner and Appellant Herein Had No Interest in the Subject Matter.

The Portage Wholesale Company was the debtor corporation and it is now the bankrupt corporation. The Portage Wholesale Company deposited the $25,000.00 with the Referee in Bankruptcy as part of a plan of arrangement. At the time the Portage Wholesale Company was a Wisconsin corporation.

The Portage Wholesale Company defaulted in fulfilling the terms of its confirmed plan of arrangement. Upon petition and notice the District Court ordered the $25,000.00 fund deposited by the Portage Wholesale Company remitted to the Trustee in Bankruptcy to be used in payment of expenses and costs of administration and priority claims. Jacob H. Marachowsky, as an individual, petitioned the District Court for the return of the $25,000.00. Jacob H. Marachowsky, as an individual, filed an appeal from the District Court's order to the Circuit Court of Appeals. Jacob H. Marachowsky, as an individual, has filed the petition to your court for a writ of certiorari to review the decision and judgment of the Circuit Court of Appeals.

The Circuit Court of Appeals recognized the objection of the Trustee in Bankruptcy that Jacob H. Marachowsky

could not appeal as an individual from an order forfeiting the funds and monies belonging to the bankrupt corporation. It stated that the issue in the case from which this appeal is requested was as follows:

> "The contention of Jacob H. Marachowsky (hereinafter referred to as appellant) in this court, both in his brief and oral argument, rests upon the assertion that the $25,000.00 deposited with the referee in bankruptcy was not the money and property of the debtor but that of appellant. He further contends that for this reason he was entitled to a return of the deposit upon the failure of the debtor to perform under the arrangement which it had proposed. It is evident that appellant's contention can be sustained only if the premise upon which it rests is acceptable and that the issue, as thus narrowly presented, makes it unnecessary to consider a multitude of questions which lurk in the record." (R. 144.)

In other words the Circuit Court of Appeals recognized that the first issue before the court was, did Jacob H. Marachowsky have any interest as an individual in the subject matter before the Court? The Circuit Court of Appeals found that Jacob H. Marachowsky had no interest in the fund on deposit and in the subject matter before the court, saying:

> "That the money here deposited was borrowed is not in dispute. The question under the issue presented is whether it was borrowed by the debtor and deposited by it or borrowed by appellant in his individual capacity and deposited by him as such. Notwithstanding appellant's vigorous contention that it was the latter, we think the record clearly demonstrates to the contrary. Appellant was the holder of 260 out of a total of 274 shares of the corporate stock and he was its principal officer and managing agent. The fact, if such it be, that he was instrumental in procuring the loan from a third party does not mean that he was acting in an individual capacity rather than on behalf of the corporate debtor.

"As bearing on the disputed question, it is significant to note that appellant's name as an individual appears in the record for the first time as a petitioner for the return of the deposit. The various arrangement proposals were submitted by the debtor which made the offer, including the deposit. The seconded amended arrangement proposal, dated September 1, 1948, made by the debtor, recited among other things that at a meeting of the directors held August 31, 1948, it was resolved 'That Jake Marachowsky on behalf of the Portage Wholesale Company, be authorized to sign and present such amended petition and such amended plan to the court; that Jake Marachowsky is authorized to borrow an additional sum of $25,000 so that the Portage Wholesale Company will have $150,000 plus the $25,000 now on deposit with the court, a total of $175,000 borrowed money to effectuate such second amended arrangement and plan.' It was further recited 'That the present $175,000, including the $25,000 on deposit which he (appellant) has borrowed, is the limit of the Portage Wholesale Company's borrowing power.' Not only did the debtor propose to make the deposit, but the court in its order confirming the arrangement expressly recognized that the deposit had been made by the debtor. Furthermore, the record indicates that the money representing the deposit was never in the hands of the appellant but that it was presented to the referee in bankruptcy by counsel for the debtor in the form of a check issued by a third party and payable to the referee." (R. 145-146.)

After finding that Jacob H. Marachowsky had no interest in the subject matter before the court, the Circuit Court of Appeals affirmed the order of the District Court:

"We find no occasion to consider or discuss any issue other than whether the $25,000.00 deposit was the money and property of appellant or of the debtor. We agree with the District Court that it was the latter and that it was immaterial as to where or from what source it was obtained.

The order appealed from is Affirmed." (R. 147.)

Supreme Court Rule 38 does not contemplate the granting of a writ of certiorari to review disputed findings of fact of the District Court and of the Circuit Court of Appeals. The decision in this case, as had been heretofore set forth, is a decision based upon a finding of fact, and we submit to your court that it does not come within that group of cases in which a writ of certiorari should be granted.

Other issues are presented to the Court by the petitioner in his petition and in his brief.

Federal Rules of Civil Procedure, Rule No. 17A, provide:

> "Every action should be prosecuted in the name of the real party in interest. * * *"

By what right does Jacob H. Marachowsky petition for a writ of certiorari to review these collateral issues?

He, not being the real party in interest, is not in position to request a review of that portion of the Circuit Court of Appeals' decision directing the final disposition of the funds in question.

II.

Sections 337 and 367 of the Chandler Act Directs the Court Upon Confirmation to Use the Deposit for the Payment of Priority Debts and Costs and Expenses of Administration. This Statute Follows a Principle of Law Established Prior to Its Enactment. Clarification Is Not Required Under Supreme Court Rule 38 of the Federal Statutes.

It is clear that the funds from the deposit were and are under the control of the court and should be disposed of in accordance with its direction and order.

The language of the Chandler Act set forth in Sections 337 and 367 follows the rule of law which prevailed un-

der the previous Composition Act. This rule of law held that the deposit was chargeable with the expenses of administration and the losses of the receivership while the proposed arrangement was pending. It was so held in the following cases:

In re Weiner, 215 Fed. 278.
In re Balco Builders, 22 F. (2d) 845.
In re Moyer's Home Store, 26 F. (2d) 146.
In re Weiner, 217 Fed. 173.
In re Miller, 243 Fed. 242 (N. Y. D. C.).

In the *Miller* case the Court said:

> "It is a well established proposition in this district that, after an offer of composition by a bankrupt, the expenses of continuing the bankruptcy proceeding for the purpose of the composition instead of for liquidation of the estate, should be secured by the bankrupt, and if necessary paid out of the amount deposited for the purposes of the composition. The creditors are entitled to a distribution of the amount which is available for that purpose, without diminution by the bankrupt in his hopes to effect a composition. * * *"

All of the above cases held that it is a well established proposition of law that the expenses of continuing the bankruptcy proceeding for the purpose of a composition instead of a liquidation of the estate should be paid out of the amount deposited for the purpose of composition and that the creditors are entitled to the assets without diminution by the bankrupt in its hope to effect a composition. It is true that these cases were decided before the enactment of the statute, but the statute merely codified a doctrine which had been already established as the law applicable to such cases.

It is, therefore, apparent that there are no important questions of Federal Law involved in the decision which have not been, but should be, settled by your Court.

The petitioner in his brief cites the *Famous Furniture Company* case, 43 Fed. Sup. 946, as a case which has been decided since the enactment of the Chandler Act. This case is not applicable to the present situation because in the *Famous Furniture Company* case there was a stipulation at the time the deposit was made providing for the return of the money in case the composition was not completed.

The appellant also cites the *Roth* case, 118 Fed. 2d 156, the *Gitnig* case, 57 Fed. 43, and the *Koegel* case, 56 Fed. (2d) 827, as authority for the return of funds deposited. None of these cases are in point, because in each of them the deposit was made by third parties while in this case the deposit was made by the debtor. Clearly the decision of the Circuit Court of Appeals in this case, 187 Fed. (2d) 387, is not in conflict with the decisions of other Circuit Courts of Appeal.

III.

Title to the Money Deposited Was in the Portage Wholesale Company. Source of the Money Is Immaterial. The Fund Deposited by the Portage Wholesale Company Should Be Charged With the Expenses and Damages Arising Out of the Failure of the Portage Wholesale Company to Fulfill the Arrangement.

The petitioner in his brief alleges that an issue in this case is the question, Does the fund become part of the assets of the bankrupt estate, or does it revert to the source from which it came? This problem arises in those cases where the deposit is made by third parties. Where the deposit is made by third parties, there is authority to the effect that it reverts to the depositor. (See cases cited by the petitioner.)

In this case, the deposit was made by the Portage Wholesale Company, the debtor. It was not made by Jacob H.

Marachowsky, the petitioner. It is true that the Portage Wholesale Company borrowed the money, however, title to money or checks under the terms of the Negotiable Instruments Act passes from the lender to the borrower or holder. (See Section 116.02 and 116.62 of the Wisconsin Statutes.)

The Circuit Court of Appeals in its decision found that the deposit was made by the Portage Wholesale Company and that the fund was in fact property of the Portage Wholesale Company. (R. 145.)

In the case of *In re Wiener,* 217 Fed. 173, the Court held that the loaning of money to the bankrupt to be used for the purpose of a composition, passes title to the money, and that the person advancing the money does so without any possible reservation of claim except as he makes his claim through the bankrupt.

In was also discussed in the case of *In re Wechsler* v. *U. S.*, 27 Fed. (2d) 850, at page 861, in which the court said:

> "While the bankrupt secured the money from Mr. Wechsler, the Bankruptcy Law is not concerned with where the Bankrupt got the composition fund, nor with any arrangement between it and Wechsler. That the money came from Wechsler is an immaterial incident, but when it was deposited pursuant to the offer of the bankrupt, it was impressed as a trust fund belonging to the Bankrupt. * * *"

The decision of the Circuit Court of Appeals in this case is not in conflict with that of other circuits. It is not in conflict with the cases cited by the petitioner. His cases deal with a different set of facts. The above cited cases cover the issue in this case, and on this issue there is no conflict between the various circuits, and there is no federal statute requiring interpretation or clarification by your court.

IV.

The Proceedings by the Portage Wholesale Company Under Chapter XI, Were for the Benefit of the Debtor. The Proceedings Were Continued to Allow the Debtor to Perfect Its Arrangement. The Creditors Are Entitled to the Property of the Debtor Without Paying the Expenses Created by the Portage Wholesale Company. There Should Be No Diminution of Assets to Pay Expenses Created by the Debtor.

Under the first section of our Argument, we pointed out that the cases hold that the fund, if deposited by the bankrupt can be charged with the expenses, costs, and losses of the receivership.

The cases so holding are:

In re Wiener, 215 Fed. 278.
In re Balco Builders, 22 F. (2d) 846.
In re Moyer's Home Store, 26 F. (2d) 146.
In re Wiener, 217 Fed. 173.
In re Miller, 243 Fed. 242 (N. Y. D. C.).

If Sections 337 and 367 of the Chandler Act, Title XI, U. S. C. Section 737 and Title XI, U. S. C. Section 761-767, had not been enacted under the cases cited the fund in question could have been charged by the court with the expenses and costs of administration.

We submit that your court should not issue a writ of certiorari to review a statute that codifies the rule that existed at the time of its enactment.

We recognize that the rules of the United States Supreme Court allow the Court to issue a writ of certiorari for a review of a decision of the Circuit Court of Appeals which has "decided an important question of Federal Law which has not been, but should be, settled by this court."

We submit to this court that Section 337 and Section 367 of the Chandler Act do not involve important questions of Federal Law. The two sections are in part administrative directives to the District Judge or the Referee in Bankruptcy. They are not ambiguous and they do not require interpretation.

As the Circuit Court of Appeals, said:

> "Under the plain language of the Statute, the deposit upon confirmation becomes available for the payment of priority debts and for the cost and expenses of the proceeding." (R. 146.)

Federal Statutes which contain administrative directives in plain and unequivocable language are not so important as to require the decision of your court. They do not involve any substantial problem of public interest.

V.

The Application in the District Court to Modify or Vacate the Court's Order Was Not Timely Made Under Federal Rules of Civil Procedure, 59(e).

The Federal Rules of Civil Procedure as amended, provide under Rule 59(e), as follows:

> "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

The judgment of the District Court directing the remitting of the $25,000.00 fund to the Trustee in Bankruptcy as an asset of the bankrupt estate and charging it with the expenses of administration, etc., was entered on December 16, 1948. Service of motion to alter and vacate the judgment was served on January 13, 1949, or 28 days later. (R. 93.)

The District Court in its decision found that the motion was not timely. (R. 126.) The Circuit Court of Appeals did not pass upon this issue holding that in view of its decision it was unnecessary to consider this issue. (R. 144.)

We submit to your court, that in view of the decision of the Circuit Court of Appeals, this issue in this case is at best a moot question and we further submit that writs of certiorari should not be issued to review moot questions of law.

Conclusion.

George L. Devine, Trustee of the Portage Wholesale Company, a bankrupt corporation, does respectfully request of you that the petition for a writ of certiorari to review the decision of the Circuit Court of Appeals be denied.

In our Argument and Brief, we have not attempted to fully argue the merits of the questions involved. If the petition is granted, the respondent desires to submit a brief in which he will more fully discuss the issues.

Your respondent is of the belief that the opinion of the Circuit Court of Appeals, in 187 Fed. (2d) 387, Rec. 143, is as stated by the court, based upon a narrow issue of fact and that the case presents none of the special or important reasons for review as set forth in Supreme Court Rule 38.

Respectfully submitted,

GEORGE L. DEVINE,
Trustee of the Portage Wholesale Company, a bankrupt.

By ROSS BENNETT,
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